

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
AVALON HOLDINGS CORPORATION, : Docket #18cv7291
 : 1:18-cv-07291-VSB-RWL
Plaintiff, :
- against - :
GENTILE, et al., : April 23, 2020
 : New York, New York
Defendants. :
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE ROBERT W. LEHRBURGER,
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

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HONORABLE ROBERT W. LEHRBURGER (THE COURT):

Hello, this is Judge Lehrburger, good morning. Who do I have on the line, please, starting with plaintiff?

MR. DAVID LOPEZ: David Lopez for the plaintiff.

MR. ADAM FORD: And good morning, Judge, it's Adam Ford on behalf of the defendants.

THE COURT: All right, and I believe we have another caller on, my law clerk, who's there?

THE CLERK: Yes, Judge, this is Amanda.

THE COURT: Okay, and it said we had five, does that mean Kevin's aboard also or someone else?

THE CLERK: Hi, Judge, yes, it's Kevin.

THE COURT: All right, thank you, that's my law clerk to be.

MS. MIRIAM TAUBER: Hello.

THE COURT: Hello, who just joined?

MS. TAUBER: This is Miriam Tauber.

THE COURT: Hello, Ms. Tauber, this is Judge Lehrburger, everyone seems to be aboard. So I have asked for this conference in light of the correspondence I received from the parties concerning plaintiffs' contentions that defendants have not done what they need to do with respect to certain discovery requests and also seeking certain rulings regarding preclusion. I

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read through what I have, but I would like to go through the (indiscernible) one by one, and I think the best way to do that is by, I'm going to use the list of relief sought in Mr. Lopez' letter, document 55. Before we go there let me just ask, have any of these issues been resolved yet?

MR. LOPEZ: David Lopez, no, they have not.

THE COURT: Okay. All right, so the first issue concerns the first set of interrogatories and if I understand it correctly, and correct me if I'm wrong, the concern with answers in those interrogatories is with respect to affirmative defenses, do I have that right, Mr. Lopez?

MR. LOPEZ: Principally, affirmative defenses, but there are 13, well there were 12 original interrogatories, every one of which was refused, and then an additional, an additional 4 interrogatories, I'm sorry, 5 interrogatories, 13 through 17, every one of which was refused on the spurious invocation of Local Rule 33.

THE COURT: Sure. So let me ask the defendants about that. I actually have not seen the specific requests but you've done a fair amount of discovery and so why have those not been answered?

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2 MR. FORD: Sure, Your Honor, this is Adam
3 Ford. I mean with respect, I'm a little confused,
4 with respect to the, and I don't have them in front of
5 me, but we certainly answered all of the
6 interrogatories, you know, the numbers that are
7 permitted under the local rules, and we've provided
8 all of the answers to those interrogatories. With
9 respect to --

10 THE COURT: Well I'm talking about the ones
11 that aren't the ones to which you objected based on
12 Local Rules, I'm sorry, the ones that you have
13 objected to based on the Local Rules. How many have
14 you not answered based on that objection?

15 MR. FORD: Oh, Your Honor, I apologize, I
16 don't have that number in front of me, but think there
17 was --

18 MR. LOPEZ: (indiscernible)

19 MR. FORD: Mr. Lopez might know, sure, of
20 course.

21 MR. LOPEZ: Yeah, there are 17 interrogatories
22 posed and 17 interrogatories answered that no answer
23 would be forthcoming because of Local Rule 33.3

24 THE COURT: And you're saying, Mr. Lopez, that
25 for all 17 of those there was, indeed, no answer,

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notwithstanding that objection?

MR. LOPEZ: That's correct.

THE COURT: All right, so let me go back to the defendant then, why have those not been answered?

MR. FORD: I, Your Honor, my understanding is that all of our interrogatories that we were required to answer have, in fact, been given substantive answers to and we were, we had objected only on the basis of the number under the Local Rule for their exceeding their limit on those, you know, for those questions, and those were the ones that were not answered.

THE COURT: Oh, I see, so you're saying you answered 25 interrogatories already?

MR. FORD: Yes. Yes, that's my understanding, yes.

MR. LOPEZ: Your Honor, David Lopez, this is absolute nonsense, not a single one of the 17 interrogatories was answered except with a Rule 33 objection.

THE COURT: Okay, and, Mr. Lopez, have you issued interrogatories that are any more than those 17?

MR. LOPEZ: No, Your Honor.

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THE COURT: Do those 17 have subparts?

MR. LOPEZ: No.

THE COURT: Okay, so let me go back to the defendant, why do we have this discrepancy on what interrogatories were actually served?

MR. FORD: Your Honor, I apologize, I just don't have, I don't have it at my fingertips. And so I, yeah, I think there's just a misunderstanding. I've seen the interrogatories when they went out and my understanding was that we answered the original, and I don't have the numbers but I think it was the 25 that were permitted, and then it was only the ones that were above that number that we objected to.

THE COURT: All right, here's the deal. One, I don't strongly believe in strict enforcement of Rule 33, and that's because there are many interrogatories that can be answered, that are far better answered by a response than other means of discovery or possibly in addition to other means of discovery. But with respect to certain contentions, it is true those are better used at the end.

Not having seen the actual interrogatories, it's hard for me to say where they lie, but my general view is interrogatories should be answered to the

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2 extent you have knowledge to be able to answer it at
3 that time and that there is always a right to
4 supplement later on if by the end of discovery
5 something changes.

6 Secondly, as to number, it is limited to 25
7 and some use of subparts, well it depends what
8 somebody interprets the subparts. If there are
9 subparts that truly ask for different types of
10 information, that is not allowed. If it's a subpart --
11 hold on, if it's a subpart that says identify by name,
12 identify date, things like that, to me those are not
13 subparts. But clearly what you guys need to do is to
14 get back on a meet and confer and get on the same page
15 about what has or has not been answered and go by what
16 I have just explained are my views on how they should
17 be handled. If any disputes remain after that further
18 meet and confer given this guidance, you can bring the
19 dispute to my attention.

20 As for any instruction about preclusion, that
21 is premature and not something to be resolved at this
22 time anyway.

23 MR. LOPEZ: Your Honor, may I speak, David
24 Lopez?

25 THE COURT: Yes, Mr. Lopez.

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MR. LOPEZ: You have addressed and issue that is not before the Court. Mr. Ford is mistaken, let me read a typical example of his answers.

THE COURT: Okay, well give me a question and give me an answer.

MR. LOPEZ: "Identify any of the above interrogatories that you believe would be more economically of effectively answered through questions at an oral deposition." Response: "Without waiving any of its objections, defendants state that none of the above interrogatories, to the extent they are allowed under Federal Rule 33, Local Civil Rule 33.3, would be more effectively answered" --

THE COURT: Okay.

MR. LOPEZ: Every one of --

THE COURT: Hold on, so they said that. Now, did they provide answers to any of the actual interrogatories --

MR. LOPEZ: No.

THE COURT: Okay. So give me an example of an interrogatory that asks for actual information and what the response was, please?

MR. LOPEZ: All right, hold on a moment. "With respect to the putative first affirmative defense, itemize with particularity each and every alleged trade at

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2 issue which was related to shares that did not exist.”
3 Response: “Defendants object to interrogatory 14 on
4 the basis that it does not comply with (indiscernible)
5 by Local Rule 33.3 which limits the use of
6 interrogatories in the district to the names of
7 witnesses, computations of damages, and location of
8 relevant documents. These interrogatories were served
9 in the fifth month of discovery.

10 THE COURT: Right, and to just comment, that
11 goes back to an affirmative defense issue which,
12 again, is what I remember being a primary focus. I
13 understand the defendants to take the position that
14 they have explained the basis for their affirmative
15 defense, but this does sound factual. I, frankly, have
16 no idea how related that question is to the
17 affirmative defense, but let me ask defense counsel
18 how that should be dealt with.

19 MR. FORD: Yes, Your Honor, and thank you, I
20 just, I pulled up the interrogatory responses as we
21 were talking so I could, so I can address this. Here
22 was the issue with all of the interrogatories that
23 were propounded, right, and I’m looking at, for
24 example, this is number 13. And, again, it’s asking
25 about the affirmative defenses and the itemization.

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And they say with respect to sort of every trade, they want the date of the transaction, the nature of the quality of shares, the price paid, the identity of the counterparty. This one has A through L, so however many subparts that is, right? And all that they're asking for in this interrogatory, and most of all the other ones that I looked at are very similar, they're asking for us to put in prose form what the trade records show, right?

THE COURT: Okay, so here's the answer to this. So there's an easy answer which is you refer them to the documents and where the information is in the documents generally.

MR. FORD: Okay.

THE COURT: That's all you need to do. For ones like that, if your contention is that this is information that is all set forth elsewhere, just identify where that information is.

MR. FORD: Okay, I can do that. That's absolutely the easy answer on this.

THE COURT: All right, so look, guys, these are basic principles in the discovery and answering interrogatories and I think you need to, both need to do a better job at communicating about exactly what the issue is and how it can be resolved. And the Federal Rules

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expressly provide that you can answer an interrogatory by reference to two documents, as long as you point out where that information is.

All right, we're moving on from the interrogatories. I've given you my instructions, I've given you the principles, again, meet and confer. I do think plaintiff, I'm sorry, defendant should amend their responses. If you think it would be better to meet and confer before you do that, then I suggest you do that with Mr. Lopez, otherwise you should -- how long do you think it will take you to amend those?

MR. FORD: We could probably, today's Thursday, I mean we can, I'll try and arrange a meet and confer for, you know, Monday or Tuesday of next week and then maybe if we have until next Friday we can probably get them, get everything amended and cleaned up.

THE COURT: All right, so I'm going to direct that the amended interrogatories be provided by Friday of next week and Mr. Lopez will take a look, if there are issues talk them out, if they're still in dispute bring them to my attention.

MR. FORD: Okay.

THE COURT: All right, that takes care of the

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first and second set of interrogatories. Deposition testimony. So I see the specific items mentioned here and I think we should just check through them. Antonio Collie's (phonetic) address and contact information, I did see in defendants' response you said that you would endeavor to provide that but why is it not so easy jus to provide it?

MR. FORD: Oh, Your Honor, I have not, since they filed this letter we were just waiting for, to discuss it here. I mean we can find Antonio Collie's information but I guess the question is why that has any relevance to any of the issues in dispute?

THE COURT: Well I think it's interested in getting the discovery that he claims he is due. Now we're going to talk about that, this is just identification of a person's contact information, and in this case, given what his role is, it should be provided.

MR. FORD: That's fine, Your Honor, we can provide that, yes.

THE COURT: Whether he can, you know, whether he will be entitled to seek discovery from that person remains to be seen.

All right, number two, now we're at the heart

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2 of that issue. So he, I believe you were asking for,
3 Mr. Lopez, production of the entire thumb drive that
4 has all of MintBroker's information. My understanding
5 from defendant is that defendant believes it has
6 produced everything that's responsive and that that
7 thumb drive would not have anything other than
8 duplicative documents or perhaps a few others that,
9 you know, are not proportional and material to further
10 review.

11 Mr. Lopez, why do you think you're entitled to
12 the entire thumb drive?

13 MR. LOPEZ: I have no interest in the parts of
14 the thumb drive that do not relate to this case. I do
15 believe that they will be relevant to a claim that Mr.
16 Gentile made at his deposition that he did not
17 understand such questions as were you paid for your
18 sales. I'm sorry, the British term for this is dumb
19 insolence, that he does not understand what being paid
20 means. That thumb drive will carry the ledgers of
21 MintBroker and will demonstrate whether or not
22 MintBroker was paid.

23 MR. FORD: Your Honor, I can, yeah, I can
24 respond to that. I don't, again, I don't understand
25 that there is absolutely no dispute about what the

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2 records show in terms of the, you know, the positive
3 account balance resulting from these transactions. So
4 there's no, we don't need to go, they already have
5 those documents in their hands and they're not even
6 disputed. In terms of what Mr. Gentile testified to, I
7 think there is maybe, and I don't remember what he's
8 referring to, but there must have just been some
9 slight, you know, confusion about phraseology. But
10 we're not saying, I mean, Your Honor, if I could, this
11 whole case, you know, from our perspective, hinges
12 upon whether when there's the, when individuals are
13 sort of placing trades in what is effectively, you
14 know, almost sort of a shadow market, for lack of a
15 better word, but engaging in trading that aren't
16 connected to the actual shares, right, because the
17 shares we know don't actually move. But so that's sort
18 of where the heart of this fight is.

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20 But in terms of the money, the documents that
21 are currently in plaintiff's possession show that with
22 respect to these transactions there was a positive
23 account balance that winds up, you know, in, you know, in
24 the account. Now, if Mr. Lopez is saying did you get paid
25 on this, I think Mr. Gentile may have said I don't know,
that phraseology isn't how we think of these, I don't get

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like paid on these shares. If you engage in these trades, these transactions, you know, if we, but if you look at the account statement, right, the account statement is going to show the transactions at issue, and there's no dispute about them, and they are going to show the amount of money that's in the account at various points throughout this transaction. That's all accurate, that's all in their possession and that's all not disputed.

So the idea that we --

THE COURT: Let me, let put this, let me rephrase what I am hearing. According to you, the issue is one of characterization, not of the actual data. And you're saying they have the actual data?

MR. FORD: One-hundred percent, that is accurate.

THE COURT: So, Mr. Lopez, what do you say in response to that?

MR. LOPEZ: This is not what Mr. Gentile was testifying to. He, we asked him repeated, you say you did not receive shares, did you receive payment for selling shares, and we never got a straight answer.

THE COURT: All right, well what data do you think there will be that's different from what you already have?

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MR. LOPEZ: The cash ledgers of MintBroker. I'm sorry, the accounting term, the journals and ledgers of MintBroker as they relate to these trades.

THE COURT: And, Mr., I'm sorry, for the defense, why, well would you, why is that not different from what you've already provided, or is it?

MR. FORD: Yeah, no, well, one, you can see in the documents that everyone has, that plaintiffs have that have been produced, you can see the change in the account balance based on these transactions. They have those numbers, they know what the value is, there's no dispute about that, that's not hidden, and so they now seem to want to suggest, well, we want to look at the account, you know, the cash ledger, but it's not a, that's not even the information because if all the money --

THE COURT: Are you conceding that the, that MintBroker recorded the receipt of funds in connection with those shares on their balance sheet or their ledger?

MR. FORD: Yeah, I mean I think what I'm saying is we're not disputing, we're not disputing that the, that these transactions resulted in, in sort of an increase in account balance, right, in the form of cash, right, in the account, and that they have that

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2 number and we all agreed to that.

3 THE COURT: Your defense is that there was an
4 exchange of cash but not ever ownership of shares?

5 MR. FORD: Yeah, that's exactly right, our
6 argument is that he was never an ultimate beneficial owner
7 or statutory insider because these were transactions in
8 cash that were completely divorced from any movement of
9 shares. So I will stipulate --

10 THE COURT: No, you will stipulate, go ahead.

11 MR. FORD: Yeah, no, I'll, I mean I'll have to
12 look at the balance or the share prices but I think we can
13 stipulate to what those numbers are.

14 THE COURT: Mr. Lopez, this sounds to me like a
15 matter of --

16 MR. LOPEZ: That will be acceptable --

17 THE COURT: Okay, that will be acceptable, good.

18 MR. LOPEZ: Yea.

19 THE COURT: All right, so you will, why don't
20 you draft a stipulation and then provide a draft to Mr.
21 Lopez and see if it is sufficient for the issue.

22 MR. FORD: Okay.

23 THE COURT: When do you think you can provide
24 that?

25 MR. FORD: Your Honor, if we could get, I

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don't want to jam myself up on agreeing to next Friday again, but maybe the following week?

THE COURT: Why don't we say Wednesday of the following week?

MR. FORD: Sure.

THE COURT: Okay, let's say that. All right, the next two items on the deposition confirm the affirmative defenses, bad faith and waiver. According to defendants, a general explanation was provided. Mr. Lopez, what is it that you are looking for other than that explanation?

MR. LOPEZ: A factual basis for each of those defenses.

THE COURT: And I'd like to hear from the defense about why those facts can't be provided, Mr. Ford?

MR. FORD: Yeah, sure, the answer is because we haven't completed discovery. In terms of the unclean hands defense, I mean, look, as I said, Your Honor, our primary argument in this case and defense is the one I just articulated, right, so that's sort of our first line and that will be in our motion for summary judgement, what we argue.

With respect to the waiver and unclean hands,

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2 that has to do with the behavior of the actual
3 insiders of these two companies in terms of whether
4 they were selling shares during the short swing,
5 during the short swing period. And the waiver, you
6 know, argument was also tied to we know that the CEO
7 of Avalon, you know, during this period, went out and
8 publicly stated that, you know, that they didn't know
9 who Mr. Gentile was, he wasn't an insider, he didn't
10 have information, you know, access to inside
11 information, et cetera. So but we have not yet had an
12 opportunity to depose the CEOs of these two companies
13 and so the answer for why we haven't provided more
14 facts than we have (indiscernible) we just haven't
15 completed discovery yet.

16 And because, and I'll just make another point,
17 we do have the trade ledgers which, well, I'm sorry,
18 we don't have the actual trade ledgers from the two
19 companies. Apparently we couldn't get them from the
20 transfer agent, instead they just sent us, you know,
21 written confirmations that no shares have changed
22 hands with minimal exceptions, that are completely
23 unrelated to Mr. Gentile or MintBroker. And so we
24 think, you know, the issue is we still need to ask
25 those questions and see if we can just dig in to what

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2 these other de minimis, you know, these other
3 transactions are that are unrelated to Mr. Gentile or
4 MintBroker. So that's why we haven't given them more,
5 but we've certainly, we've sort of been saying, you
6 know, the same thing for several months, they know as
7 much as we do at this point. And as we complete
8 discovery, you know, we're happy to give them a more
9 fulsome explanation, but that's where we stand on
10 this.

11 THE COURT: So there's always a tricky balance
12 with respect to affirmative defenses. Defendants at
13 the beginning of a lawsuit are concerned about not
14 waiving any defense, they reflexively put down a
15 number of them and are hoping that they might turn up
16 information or just making sure to preserve it, yet
17 don't really have a factual basis to assert it. At
18 the same time there may be ones that are asserted that
19 do have a factual basis and there are some facts on
20 which to believe that those affirmative defenses
21 exist.

22 And so, again, my view on this is if you have
23 any facts that you know of to support those
24 affirmative defenses, those should be given in
25 response to the interrogatory, again, subject to the

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2 qualification that discovery is ongoing and it may
3 well be amended. But the, Mr. Lopez, as the plaintiff,
4 needs an understanding of what your theory is and what
5 facts are there so that he can conduct his discovery.
6 So my point is just you provide what you can now and
7 then you supplement later. Is that doable?

8 MR. FORD: That seems, yes, absolutely, Your
9 Honor, thank you.

10 THE COURT: All right, so you'll provide those
11 along with the amended responses that are coming next
12 Friday.

13 MR. FORD: Yes, I'll include that updated
14 information on that --

15 THE COURT: Oh, I'm sorry, yes, okay.

16 All right, then we have the issue of Mr.
17 Gentile's Form 5471, and so I see what Mr. Lopez has
18 explained. Mr. Ford, what is the reason there that
19 it's not being provided or is it?

20 MR. FORD: The Form 5471 is his tax form, it's
21 one of the tax forms, correct?

22 THE COURT: Yes.

23 MR. FORD: Yeah, our response to this is that,
24 is the same, you know, as to the prior discussion that
25 we just had with respect to they are, they have the

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2 information related to these trades, right, related to
3 the trades at issue. We know what the change in the
4 account balance is. So going after, you know, the
5 thumb drive, or the balance sheet, or his tax forms, I
6 think they are really just going to try and get more
7 information than is remotely relevant. And again,
8 we're agreeing, we're not fighting them on what those
9 numbers state regarding the trades, and they have
10 that. And so, therefore, to say, hey, now we need his
11 tax form as well, I'm just, I really do actually
12 believe that plaintiffs are just trying to sort of
13 fish for more information about my client and it's
14 just, it doesn't advance this litigation at all, is if
15 he turns over the Form 5471 they will have no more
16 relevant information for this case, right, and yet
17 they'll have additional information that's just not
18 relevant and that might, you know, we strongly object
19 to turning over. Particularly, you know, there is
20 simply no reasonable basis for us to have to turn this
21 over.

22 THE COURT: Mr. Lopez, given the stipulation
23 that we discussed just earlier, why doesn't that
24 obviate the need for this form?

25 MR. LOPEZ: It may well.

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THE COURT: Okay.

MR. LOPEZ: It may well.

THE COURT: All right, so why don't you think about that and see what you work out with a stipulation, and if that goes away, great, if it doesn't and it's still disputed you'll come back.

All right, cost sharing. So I understand both parties have issued third party requests to some or all of the same third parties and it sounds as if the defendant is narrower than what the plaintiff has been seeking. And so the defendant says they should not be charged with following up on the issues and documents that go beyond what our subpoena was about, and to the extent we, the defendant, have received information in response to our narrower subpoenas, we have provided to that to the plaintiff, although right now we're holding it hostage because we haven't been getting information from him.

So let me make sure I, is that an accurate presentation, Mr. Ford, or is there more you want to say on that?

MR. FORD: No, I think that's right, Your Honor. I mean we've spent about \$2,000 paying third parties to get documents. It never even occurred to us

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2 to withhold anything, we immediately just started
3 transferring, you know, all the documents that we
4 received having paid, you know, out of our pocket.
5 And, frankly, we're working under the assumption that
6 this is going to flow both ways and then we learned
7 that it wasn't and that we got sort of a handful of
8 additional documents that we didn't send over, we have
9 no objection to sending over, but we just think that,
10 you know, there ought to be some fairness at play. And
11 I don't know, you know, how much plaintiffs have spent
12 on third party discovery but, you know, but whatever
13 it is, I think they are getting relevant documents,
14 and we're expecting to get them. And I think it's,
15 you know, fair is fair that they turn them over
16 without demanding partial payment because we, you
17 know, we simply didn't do that.

18 THE COURT: So, Mr. Lopez, I want to ask you,
19 no, I want to ask you questions in this particular
20 order. First of all, do you have documents you have
21 received from third parties that you have not yet
22 produced to the defendants?

23 MR. LOPEZ: I believe so, my colleague,
24 Miriam, has been doing discovery.

25 MS. TAUBER: Hi, (indiscernible) I'll chime in

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2 if that's okay. We do, we have, we've also spent, I'm
3 not exactly sure of the amount, but I've offered to
4 share invoices with them so we can sort of even --

5 THE COURT: Well that's not my question, my
6 question is whether you have documents?

7 MS. TAUBER: So we have a lot of documents
8 and, honestly, I'm not even sure, they've very
9 voluminous, there are a lot of spreadsheets that I'm
10 not sure how relevant they are. I mean I'm sure
11 there's like some --

12 THE COURT: Okay, you can stop. You can stop.
13 Look, no one is allowed to hold onto and not produce
14 documents received from third parties. They are to be
15 produced to the other party upon receipt, period. If
16 there are issues about cost, that can be raised
17 afterwards if there haven't been an agreement
18 beforehand, but I do not want to see any documents
19 withheld.

20 All right, second issue, cost. And Mr. Lopez,
21 why should the defendants be charged and forced to pay
22 for following up on your subpoenas?

23 MR. LOPEZ: Our offer to the defense was pool
24 whatever disbursements we each have made and split it
25 down the middle.

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THE COURT: But why do that if you're seeking broader and more information than they are?

MR. LOPEZ: Again, my colleague is, has been in charge of discovery and I would beg to defer to her because she knows what she's talking about and I don't.

THE COURT: All right, Ms. Tauber.

MS. TAUBER: So I, so we did request a broader category of documents, we got the broader category of documents, and we are certainly not planning to use any of them. And as I was trying to say, they're so voluminous that I'm not even sure I can electronically send them. But I got them to do a files transfer link and I, I had told Mr. Ford at the beginning of the case that we had paid for them, and I said, oh, you know, we could share the invoices and I never received a response to that.

So, you know, we know that every document that we think is relevant they also have. We have submitted those into evidence in depositions, we're not going to use anything that we haven't yet expressly showed them. And so (indiscernible) we go on this way and we'll make sure that every document we send and produce in some way you've seen, or we could

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2 give you everything and figure out some way to do
3 that, but we do want to share, you know, we'll send
4 you our receipts, you send us yours and we'll line
5 them up. And so that's (indiscernible) one or the
6 other.

7 THE COURT: All right, right now I'm not going
8 to order cost sharing. To the extent the plaintiff has
9 issued subpoenas to third parties and has received
10 documents and it followed up to get them, plaintiff
11 has to produce those to the defendant ASAP.
12 Defendant, to the extent they issue subpoenas and get
13 material in response, they have to produce it to
14 plaintiff, period. There may come a point later in
15 the litigation where the issue of cost may arise,
16 either because of particular rulings that are made or
17 the outcome of dispositive motion or trial. So there
18 is certainly no prejudice to raising cost issues at
19 that time, but right now there will be no sharing of
20 costs.

21 All right, discover deadline certainly will be
22 extended. I know the defendant has asked for a stay. I
23 don't typically do that. I don't like to have cases
24 just hanging out there and then people say well when
25 it becomes feasible we'll start up again. We are in a

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situation that is difficult for everyone and litigation still has to be able to go forward, even if not quite as quick or as, in the exact ways that people may have wanted when we are not restricted to social distancing and quarantine and all that.

So as you likely know, we, certainly in the Southern District and I think probably in all districts, are encouraging the use of remote depositions. They, certainly for many parties and third parties should work just fine. I understand issues about being able to have people in different locations and show them the same document, et cetera, but technology does permit that to be done. So I suggest you all look into that and try to figure that out, but I'm certainly going to grant an extension. And what is the current deadline, Mr. Lopez?

MR. LOPEZ: Four days ago.

THE COURT: Okay, so in your letter you had said 60 days, do you still think that is sufficient time?

MR. LOPEZ: Absolutely.

THE COURT: All right, and what do the defendants think on that?

MR. FORD: Your Honor, yeah, 60 days, we could

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2 certainly, we can certainly set that as long as Your
3 Honor won't hold me to not come back and suggest that
4 we might need some more time. But I do think, I mean
5 from our perspective, Your Honor, we were hoping to be
6 able to take the deposition of, you know, the two CEOs
7 in person and that was sort of part of what was behind
8 our suggestion of a stay because things are just so,
9 you know, unknown right now.

10 We can, you know, if Your Honor sets the 60
11 days, obviously I think that, as you just said,
12 suggests that we need to take the depositions by, you
13 know, by Zoom or something like that, which we can, if
14 that's the order than we'll do that and in which case,
15 you know, will endeavor to get that done within the
16 next 60 days, and if we can't I'll come back to Your
17 Honor hat in hand.

18 THE COURT: All right, so what I'm going to do
19 is this. I'm going to extend 60 days from today and I,
20 as I said, I want you to explore and see what can be
21 done with remote depositions. I understand that there
22 are and will always be certain witnesses that the
23 parties certainly would prefer to be able to depose
24 live, so perhaps it would make sense to defer deposing
25 the CEOs towards the end of that 60 days to see if

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anything lightens up that would allow that to happen in person, although we shouldn't bank on that, but for now you should assume it will all take place in 60 days. If there are any difficulties and if there's good reason, good cause for further extension, I'll certainly be receptive to hearing about that.

All right, anything else? Anything else from the plaintiff?

MR. LOPEZ: No, Your Honor, thank you.

THE COURT: Anything else from the defense?

MR. FORD: No, Your Honor, thank you very much for this morning here, we appreciate it.

THE COURT: All right, well most importantly I hope everyone is healthy, I hope your loved ones and your colleagues are healthy and as I say to everyone, this, too, shall pass, and it will. So be well and we are adjourned for now, thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Avalon Holdings Corporation versus Gentile, et al., Docket #18cv7291, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: October 25, 2021